Appeal No. UKEAT/0115/17/DA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 5 October 2017

Before

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

(SITTING ALONE)

REV J GOULD — APPELLANT

TRUSTEES OF ST JOHN'S DOWNSHIRE HILL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MARTIN FODDER (of Counsel) Instructed by: Messrs Sugiyama and Co Meadow Lodge Lobswood Manor Tilford Road Lower Bourne Farnham GU10 3RW
For the Respondent	MR THOMAS CORDREY (of Counsel) Messrs Bates Wells Braithwaite LLP 10 Queen Street Place London EC4R 1BE

SUMMARY

SEX DISCRIMINATION - Marital status

The Employment Judge was wrong to conclude that this case did not engage the protected characteristic in section 8 of marriage. On a reasonable reading of the Claimant's pleaded case, the facts give rise to an arguable case that it was his married status and his marital difficulties as a married man that led to his dismissal. That composite reason was, on his case, the reason for the Respondent's treatment of him and that case should have been permitted to proceed.

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

1. This is an appeal from a Judgment of Employment Judge Lewzey, sitting alone, following a Preliminary Hearing with Reasons promulgated on 21 April 2017. The Employment Judge held that the claims pursued by Reverend Jonathan Gould of unlawful direct and indirect discrimination on the grounds of marriage should be struck out as having no reasonable prospects of success without hearing any evidence.

2. Reverend Gould challenges the decision so far as it relates to unlawful direct discrimination, contending that the Employment Judge was wrong to conclude that his case did not engage section 8 of the **Equality Act 2010** ("EqA"). He contends that as a matter of fact it did. He was married and contended in his claim form that he was treated less favourably because he was married and had marital difficulties. Properly understood, his pleaded case focused on marriage and the difficulties he had within the status of marriage, and that was the reason for his treatment. That raised a triable issue and it follows that to strike out the claim of unlawful discrimination without first resolving disputes of fact was an error of law.

3. The appeal is resisted by the Respondent. I am grateful for the able assistance I have received both orally and in writing from Mr Fodder, who appears for Reverend Gould but did not appear below, and from Mr Cordrey, who appears for the Respondent before me as he did before the Employment Tribunal. I refer to the parties as they were below for ease of reference.

The Facts

4. The facts have not yet been determined but can be summarised shortly by reference to the Claimant's claim form, albeit on that clear understanding. The Claimant was employed as a

Minister by the Respondent, a North London church, from 1 September 1995 until his summary dismissal on 1 August 2016. During his ministry the church prospered financially and the congregation grew.

5. He married in 1997. Difficulties in his marriage were raised with the Claimant by the Respondent's leadership team and in May 2015 it was proposed that he take a sabbatical from duties in order to attempt to restore his marriage. At paragraphs 14 to 16 of his claim form the Claimant describes particular events in May 2015 as follows:

> **"14. Alex Chitra sent an email to [the Claimant] on 5 May 2015 asking to talk about [the Claimant's] martial situation and expressing concern about "*how it not only affects you and family but the wider church family*". On 7 May 2015 he followed with another email which stated as follows:**
>
> > ***"What if the worst scenario occurs? Your marriage fails and you get divorced. I assume then your pastoral ministry at sjdh will come to an end. I hope this is a right assumption and not a presumption. We need an action plan therefore which the leadership team and wardens have agreed to and they're aware of well in advance. This is responsible planning as I see it. We need an action plan to enable a hand over for the functioning of core church affairs, guidance on seeking your replacement, Andy's future as curate in your absence etc."***
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> **15. On 19 May 2015 Beth told [the Claimant], and simultaneously a member of the LT, that she wished to move out of the marital home. On the preceding day, 18 May, the LT had held a meeting, with [the Claimant] present, at which a letter was read out and then given to him. The letter said:**
>
> > ***"After much careful thought, discussion, and consideration of scripture, it is our unanimous view that the ongoing situation of the breakdown of your marriage is incompatible with your position as leader of the fellowship of St John's.***
> >
> > ***The evident effects on your behaviour, care of staff, and the unity and wellbeing of the fellowship mean that we cannot support a continuation of the present state of affairs.***
> >
> > ***We therefore propose that your undertake a sabbatical from all leadership, management, pastoral, and preaching duties at St John's for a period of four months, beginning on 22nd June 2015.***
> >
> > ***It is our earnest desire to see you and Beth reunited, and we hope that this time away will enable you fully to devote your physical, emotional, intellectual, and spiritual energies to the restoration of your marriage."***
>
> **16. The obvious implication of this letter was that if [the Claimant] did not manage to restore his marriage within the suggested four-month sabbatical, he should not return to his position as minister."**

As is apparent from the Claimant's pleaded case, the Respondent's letter of 18 May making the proposal for a sabbatical expressed the unanimous view that "*the ongoing situation of the*

breakdown of your marriage is incompatible with your position as leader of the fellowship of St John's".

6. The Claimant did not wish to take the sabbatical. However, he came under pressure in that regard. At paragraph 20 of his claim form he said:

> **"20. On 11 July 2015 [the Claimant] met with Alex Chitra, John Lawson and Matt East (one of the LT) to discuss concerns about his marriage, governance issues and care of staff. [The Claimant] had read to him a document setting out concerns raised by the staff (he was not given a copy until 19 July). The document was couched in general terms and did not make clear which staff had said what.**
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> **Three particular comments were:**
>
> > ***"You preach marriage, but you do not display biblical marriage yourself … marital breakdown is a 'terrible testimony' to believers and non-believers alike …"***
> >
> > **and**
> >
> > ***"the standard you apply to others you do not apply to yourself. The communion is a good example, where you partake in communion while not in good standing with your own wife"***
> >
> > **and**
> >
> > ***"We* [i.e. John Lawson, Alex Chitra and Matt East] *would add (and this is not included in staff statements per se), that the manner in which you respond to the concerns raised regarding your marriage by the leadership team is another example of your controlling behaviour. As far as I* [presumably Alex Chitra] *can see, not a single ordained member of the Christian community so far has stood up for biblical marriage! They have stood up for you, not for marriage! This is so perplexing for me as a lay member of the church, somehow there is a different theology applied for those in ministry. In fact you have now divided clergy vs lay over your marriage! To me, this is completely wrong and needs to be rectified.""***

Eventually he did commence a sabbatical on 1 March 2016.

7. Meanwhile he was, he alleges, subjected to what he describes as a sustained campaign of criticism in relation to his marriage by the leadership team and the senior members of the congregation. The Bishop of Edmonton became involved and recommended courses of action for resolution. A reconciliation process was undertaken between the Claimant and members of the church during the course of his sabbatical. This was facilitated by an organisation called Bridge Builders. The Claimant alleged that the fundamental difficulty that emerged from these

meetings was John Lawson and Alex Chitra's unwillingness to accept that he, the Claimant, could remain as a minister when separated from his wife.

8. On 29 July the Claimant received an email inviting him to a meeting on 31 July or 1 August. The purpose of that meeting was described at paragraph 52 of his claim form as follows:

> **"52. [The Claimant] received a further email from all the Trustees on 29 July, inviting him once more to a meeting on 31 July or 1 August. The purpose of the meeting was described as follows:**
>
> > ***"The Trustees have repeatedly made it clear that the meeting is to consider your sabbatical and potential plans for September so that the Trustees can make decision [sic] about the future. For the avoidance of doubt, one of the purposes of the meeting is to consider whether you should continue in employment at SJDH, including hearing your reflections from during your sabbatical on this topic. If you are unwilling to attend on either of the remaining future dates, then the Trustees will need to make this decision in your absence.""***

9. No meeting, in fact, took place. Instead by letter dated 1 August the Claimant's employment was terminated with immediate effect and he was told that he would receive three months' pay in lieu of notice. I have not been provided with a copy of that letter but understand that the reason for dismissal given in it is that the relationship of trust and confidence necessary for a continued employment relationship had broken down.

10. The Claimant's case on direct discrimination was put in his claim form under the heading "*Discrimination on the ground of marriage*" as follows:

> **"74. As the EAT made clear in *Ezsias v North Glamorgan NHS Trust* [2011] [UKEAT/0399/09] at [58] tribunals must be "*on the lookout, in cases of this kind* [i.e. where 'relationship breakdown' is the alleged reason for dismissal], *to see whether an employer is using the rubric of 'some other substantial reason' as a pretext to conceal the real reason for the employee's dismissal*".**
>
> **75. In this case the real reason for [the Claimant's] dismissal all along has been the difficulties in his marriage, and the inability of [the Respondent] to accept this.**
>
> **76. [The Claimant] had been at SJDH for 21 years and there has apparently been a sudden breakdown of trust between him and the Trustees in the past year alone. The only major factor to have changed is the status of his marriage. In addition, the breakdown of relationship, such as it is, is limited to the relationships between [the Claimant] and the Trustees and the former Leadership Team, not (to [the Claimant's] knowledge) the wider**

congregation. It is these same people who know most about [the Claimant's] marriage difficulties.

77. The following list of points is relied upon as evidence for the contention that [the Claimant's] marriage is the real underlying reason for his dismissal:

1) John Lawson's letter to [the Claimant's] wife, 12th July, 2014 'Our fellowship needs the minister's family to be united in love, which is not an extended separation'.

2) Alex Chitra's emails of 5 May and 7 May 2015 concerned [the Claimant's] marriage situation being incompatible with him staying as minister.

3) The 18 May 2015 letter from the Trustees and Leadership Team specifically referred to [the Claimant's] marriage as being 'incompatible with your position as leader of the fellowship at St John's'.

4) A major issue in the document setting out staff concerns read out to [the Claimant] on 11 July 2014 was his marriage. Specifically, and in addition to anything reputedly attributable to staff, the trustees say 'As far as I [sic] can see, not a single ordained member of the Christian community so far has stood up for biblical marriage!'

5) [The Claimant's] meetings with LT members in September 2015 raised the state of his marriage as the main cause for ongoing concern.

6) The 5 October 2015 letter from the LT asking [the Claimant] to resign focused on his marriage.

7) Notes of the Trustees' meeting on 7 November 2015 made by Alex Chitra state that issues discussed included 'JG's sinful and unloving pattern of authoritarian behaviour causing broken relationships at home …'

8) The Bishop's report of 2 December 2015 noted that 'Jonathan's marital situation has been raised by a number of correspondents'.

9) John Lawson contacted [the Claimant], whilst on his sabbatical, to say '*Jonathan, if you want to try and mend your marriage, go on google and put in Harry Benson. By the sound of it you have a lot in common*'.

10) The mediation meetings with John Lawson and Alex Chitra focused on their difficulty in accepting [the Claimant's] marriage situation.

11) On 28 August 2016 Alex Chitra spoke to [the Claimant's] son, George, at SJDH and said words to the effect that 'due to the fact that there are marriage issues [the Claimant] must go; I have no evidence that anything else had changed'.

Direct discrimination

78. For the reasons set out above [the Claimant] alleges that the real reason for his dismissal was the difficulties in his marriage. If he were not married, he would not have been dismissed. As a result, he has been directly discriminated against on the ground of marriage, contrary to section 13 read with section 39(2)(c) of the Equality Act 2010."

The Employment Tribunal's Judgment

11. The Employment Judge set out the principles applicable to a strike out and the general rule that discrimination cases should only be struck out after hearing evidence. As far as direct discrimination is concerned, she referred to the Claimant's pleaded case as being about the

A difficulties in the marriage. She said repeatedly that the claim is not that the Claimant was dismissed because he was married; see paragraphs 11, 12, 16, 17, 19 and 20 of the Judgment.

B 12. The Employment Judge made extensive reference to the judgment of Underhill J (as he then was) in **Hawkins v Atex Group Ltd and Others** [2012] IRLR 807. Ultimately, she concluded at paragraph 20 that "*On the pleaded case, the Claimant has not engaged the protected characteristic of marriage and therefore I strike out the claim of direct* C *discrimination*".

13. As for indirect discrimination, that claim was also struck out but I need not consider the D basis for that decision since it is not challenged on this appeal.

The Applicable Legal Principles

E 14. Rule 37(1) of Schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** gives power to employment tribunals to strike out all or part of a claim on a number of grounds including that the claim or part of it has no reasonable prospects of success. The scope of that power has been considered in a number of authorities to which F both the Employment Judge and I were referred. These include **Ezsias v North Glamorgan NHS Trust** [2007] ICR 1126 and **Anyanwu and Another v South Bank Students' Union** [2001] ICR 391. The effect of those authorities and the caution to be exercised in using the G power to strike out in a discrimination case is well established and there is no need for me to deal in any further detail with them. There are cases where a claim for unlawful discrimination can and should be struck out if the employment tribunal can be satisfied that such a claim has H no reasonable prospect of success. If the facts asserted by a claimant are not capable of constituting unlawful discrimination, that would be a proper ground for a strike out. However,

real care ought to be exercised in reaching that conclusion, particularly in a case where the facts are disputed.

15. As far as the protection from unlawful discrimination because of the protected characteristic of marriage is concerned, section 8 **EqA** defines that protected characteristic in the following terms:

> **"8.** ***Marriage and civil partnership***
>
> **(1) A person has the protected characteristic of marriage and civil partnership if the person is married or is a civil partner.**
>
> **(2) In relation to the protected characteristic of marriage and civil partnership -**
>
> > **(a) a reference to a person who has a particular protected characteristic is a reference to a person who is married or is a civil partner;**
> >
> > **(b) a reference to persons who share a protected characteristic is a reference to persons who are married or are civil partners."**

Under section 13 **EqA**:

> **"13.** ***Direct discrimination***
>
> **(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."**

16. Accordingly, what is prohibited by sections 8 and 13 **EqA** is less favourable treatment because of the protected characteristic of marriage. It is the fact of being married or the status of being married that is protected here. However, as with other protected characteristics, the fact of being married need not be the only or main reason for the treatment. If the fact that a claimant is married plays an operative part in the reason or reasons the employer has for treating that person less favourably, that is sufficient to engage the protection.

17. In the case of **Hawkins v Atex Group Ltd** the claimant was suspended pending investigation into allegations that she had employed her husband and their daughter contrary to express concerns raised by the employer. When she was dismissed, together with her husband

A and daughter, she claimed that the dismissal amounted to unlawful direct discrimination on the grounds of marriage. The tribunal struck out the claim on the basis that it had no reasonable prospects of success because there was no evidence whatever to suggest that the employer was motivated specifically by the fact that the claimant and her husband were married. Rather, it was the closeness of their relationship that formed the reason for the impugned treatment. The Employment Appeal Tribunal (Underhill J presiding) dismissed the appeal against the strikeout decision holding that less favourable treatment based not on the mere fact that the claimant is married but on the fact that he or she is in a close relationship with another employee, which would include marriage, does not comprise marital discrimination within the meaning of section 8 **EqA**. The critical passages of the judgment are as follows:

> **"9. The starting point must of course be the language of s.3 itself. In my view it is clear that (to use the terminology of the 2010 Act) the characteristic protected by s.3(1) is the fact of being married - or, to put it the other way round, that what is proscribed is less favourable treatment on the ground that a person is married. That is what the language used says. The same is true of the section in its pre-amendment form: 'marital status' naturally means the fact of being married. The relevant comparator is thus, likewise, a person who is not married. Since in any comparison for the purpose of the section the relevant circumstances must be the same but for the protected characteristic (see s.5(3)), the appropriate comparator will usually be someone in a relationship akin to marriage but who is not actually married: I will use the old and well-understood, albeit much deprecated, phrase 'common-law spouse' rather than the modern 'partner', which does not have so specific a meaning.**
>
> **10. The paradigm case caught by s.3 is thus where a woman is dismissed - or otherwise less favourably treated - simply because she is married. Such cases may seem outlandish now, but they were very common well into the post-war era, even if they had become rarer by the time of the introduction of the 1975 Act. I think it likely that it was this kind of case that Parliament principally had in mind when s.3 was first enacted.**
>
> **11. A rather less straightforward case is where the reason for the treatment in question comprises *both* the fact that the complainant is married *and* the identity of her husband - that is, where she is (say) dismissed not simply because she is married but because of who she is married to. On ordinary principles such a case will fall within s.3 because the fact that she is married is an essential part of the ground of the employer's action, even though the identity of her husband is an additional element. But it is important to appreciate that this will not be so in every case where a woman suffers less favourable treatment because of her relationship to her husband. It is essential that the fact that they are *married* is part of the ground for the employer's action. As Ms Sen Gupta succinctly put it, it is important to get the emphasis in the right place: the question is not whether the complainant suffered the treatment in question because she was married *to a particular man*, but whether she suffered it because she was *married* to that man. Some subtleties are involved here. In many, perhaps most, cases of this kind the ground for the employer's action will not be the fact that the complainant and her husband are married but simply the closeness of their relationship and the problems to which that is perceived to give rise: applying the other half of the 'two-part test' (see paragraph 7(1) above), a common-law wife would have been treated in the same way. The employer may in giving his reasons for the conduct complained of have referred to the fact that the two of them are married, or have used the language of husband and wife, but if that merely reflects the fact that in their particular case the close relationship takes the form of marriage, and he would have treated her the same if they were common-law spouses, then s.3 will not apply. Deciding whether the fact that the complainant is *married* - rather than simply that she is in a close relationship with the man in question - is the ground of the employer's action (in either**

of the ways identified in paragraph 7(2) above) will often be easy enough; but sometimes it may be more difficult. There will certainly be some cases where the reason is indeed 'marriage-specific': one example is the case of *Chief Constable of Bedfordshire Constabulary v Graham* [2002] IRLR 239 which I consider at paragraph 18 below.

12. Mr Burgher did not accept the analysis in the previous paragraph. He submitted that if, in a given case, the close relationship to which the employer objects takes the form of marriage there should be no need to ask anything further: the marriage is the ground of the action, irrespective of whether the complainant would have been treated the same way if she had been simply a common-law spouse. As for s.5(3), it all depends how you define the relevant circumstances: in this case, you cannot strip out the fact of marriage and yet leave in the equation the closeness of the relationship which is an incident of that marriage. That is a seductive submission, because often (though not always) to subject a spouse to a detriment because of his or her relationship to the other spouse will be unfair, and it is natural to feel that the law should provide a remedy; but in my view it is wrong. Although marriage and a close personal relationship usually go together, they are conceptually separate and are not inevitable corollaries of one another. They are properly to be treated as separate factors, save in the case where the fact of marriage is indeed the criterion for the action complained of.

13. I am reinforced in that conclusion by policy considerations. It is, I believe, commonly accepted that it will sometimes be legitimate for employers to accord different treatment to employees who are parties to a close personal relationship, for essentially the kinds of reasons alluded to by Atex in the present case - conflicts of interest and perceptions of favouritism, nepotism and the like; and such treatment may be 'less favourable'. Yet if the law were as Mr Burgher submits such treatment would be absolutely unlawful in cases where the parties in question were husband and wife, since direct discrimination is of course incapable of justification. That is not in my view a result that Parliament is likely to have intended to achieve, particularly since the identical treatment would not be unlawful (subject to any possible claim of sex discrimination or for unfair dismissal …) if the employees in question were in an equally close relationship but did not happen to be married: that seems to me an arbitrary and unacceptable anomaly. The approach which I favour, covering only cases where the employer is motivated (at least in part) by the fact of marriage as such, rather than by the closeness of a relationship which happens to take the form of marriage, seems to me essential if the law in this field is to remain principled and coherent. It leaves the section with a real, though less wide, sphere of operation: see paragraph 10 above."

The Appeal

18. Mr Cordrey contends that in order to determine whether the Tribunal fell into error in striking out the unlawful direct discrimination claim the exercise required of this Appeal Tribunal is first to identify the proximate cause on which the Claimant's pleaded claim relies. Secondly, the Appeal Tribunal must assume that the Claimant will make out that he was treated less favourably because of that cause. Thirdly, the Appeal Tribunal must decide whether that cause is capable of falling within the scope of the prohibition. Mr Cordrey submits that the repeatedly pleaded grounds relied on by the Claimant as the reason for less favourable treatment in his case are the fact of difficulties in his marriage and not the fact of marriage itself. He submits that the fact of being married here is a "but for" cause, whereas the difficulties in his marriage are the proximate cause or *causa causans*. On that footing he

A contends that the scope of section 8 does not extend to marriage difficulties as a protected characteristic in themselves.

B 19. Moreover, marriage difficulties cannot be treated as synonymous with marriage as a protected status because marriage difficulties do not exactly correspond with the status of marriage. There will be many married couples who do not face marriage difficulties and many unmarried couples who do face equivalent relationship difficulties. In the circumstances, he C contends that marriage difficulties are not a proxy for marriage.

20. I do not accept the arguments advanced by Mr Cordrey. I consider it unnecessary to D introduce concepts of proximate cause and 'but for' cause in to this analysis.

21. As Lord Nicholls observed in **Chief Constable of the West Yorkshire Police v Khan** [2001] ICR 1065, "causation" is a slippery word but normally it is used to describe a legal E exercise. The test for determining whether unlawful discrimination is in play under the **EqA** requires consideration of whether the less favourable treatment was because of the protected characteristic. That does not raise a question of legal causation as that expression is usually F understood. As Lord Nicholls explained, the exercise to be conducted is not to consider from the many events leading up to the crucial happening which was the operative or effective cause of the event. Rather, the exercise is to consider why the alleged discriminator acted as he did G and what consciously or unconsciously was his reason, that reason being a question of fact.

22. There is some controversy between the parties as to whether the Claimant argued before the Tribunal that this is a case involving discrimination based on a criterion that is explicitly or H inherently discriminatory on a protected ground, or whether instead or in addition he argued

A that the reason advanced by the employer is neither of those on its face so that his case depends on an examination of the Respondent's thought processes. Although it seems to be clear that there was significant reference below to **James v Eastleigh Borough Council** [1990] 2 AC 751 and it might have been better not to advance the case along those lines, it is also clear from paragraph 18 of the Judgment that Mr Henderson, who appeared below for the Claimant, argued that the Claimant's pleaded case (in particular paragraph 77) went into the underlying motivation of the Respondent's decision makers.

23. Moreover, as a matter of fact the reason given by the Respondent for dismissing was a breakdown of trust and confidence that was neither explicitly nor inherently on its face a prohibited reason. But there may be a conceptual difficulty about how to argue the case on a strikeout application since the reason for the treatment is disputed. The facts have not been found and the Respondent was seeking to circumvent an examination of those facts by making a strikeout application. Mr Cordrey accepts, both here and before the Employment Judge, that in order to do so the Respondent and the Tribunal would have to proceed on the basis of the Claimant's case at its highest ignoring that factual dispute. That meant that before the Tribunal the case was argued in effect as one in which the reason for dismissal was the Claimant's marital difficulties. The question on the strikeout accordingly was whether the Claimant's case based on "marriage difficulties" as reasonably understood from the claim form and any other material available was capable in law of giving rise to an arguable case that marriage was part of the reason. If yes, the case would have to go to trial; if not, the strikeout would succeed.

24. That seems to me to explain, at least in part, why Mr Henderson might have referred to this as a case in which the reason was an inherently discriminatory one. Nevertheless, it is clear that the pleaded case does raise issues as to the underlying reasons for the treatment.

25. As Mr Cordrey accepts the starting point is the Claimant's pleaded case. There are a number of passages that make clear to my mind what the Claimant was complaining about. They include the paragraphs to which I have referred. There are other references that compound and drive the points being made there home. At paragraphs 74 to 78 the Claimant refers to evidence on which he relies to support his contention that marriage was the real underlying reason for his dismissal. Particular points are listed serially at paragraph 77. Although at paragraph 78 the Claimant says that the real reason for his dismissal was the difficulties in his marriage, that sentence cannot be read in isolation. He goes on to say that if he were not married he would not have been dismissed and that as a result he contended that he had been directly discriminated against on the ground of marriage.

26. Although Mr Cordrey now realistically accepts that the Claimant did not expressly disavow any reliance on the status of marriage in that paragraph, he submits that was the natural reading of his pleading. I disagree. It seems to me to follow from the passages to which I have referred that the difficulties in the Claimant's marriage were, on his pleaded case, only significant to the Respondent because there was a marriage in which there could be difficulties. Paragraph 78 and other passages in his pleaded case make clear his contention that the decision to dismiss him depended on the fact that he was married and having marital difficulties, with the emphasis on 'marital' rather than 'difficulties'. The reason marriage difficulties were problematic for the Respondent flowed from the importance attached to the institution of marriage by this church employer on his case.

27. On the Claimant's case, the decision makers had a particular view of marriage and the behaviour that could be tolerated or not in a married person. It seems to me that the Employment Judge, in her selective and partial quotations from the claim form, was wrong to

A conclude that the Claimant's pleaded claim was that he was not dismissed because he was married. To the contrary, on a reasonable reading of his pleaded claim, it is clear that the Claimant was complaining that the discrimination flowed from the composite reason of his being married and having marital difficulties.

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28. Moreover, I agree with Mr Fodder that the case advanced by the Claimant is more analogous on its facts with the facts of **Chief Constable of the Bedfordshire Constabulary v Graham** [2002] IRLR 239 EAT than with the facts of **Hawkins**. **Graham** concerned a female police officer who was married to the Chief Superintendent of a particular division. She was appointed to a post in that division but her appointment was rescinded by the Chief Constable on the basis that it was inappropriate because of her relationship with her husband and his position. The primary reason for the decision to rescind the appointment was that she "*would not be a competent and compellable witness against her spouse in any criminal proceedings*" (paragraph 58).

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29. The ET's critical finding in **Graham** is set out at paragraph 53 of the Appeal Tribunal's judgment as follows:

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> **"53. The tribunal went on to say that the issue of competence and compellability can only arise between people who are married to each other and it cannot affect any other relationship. They concluded**
>
> > **'it is therefore marriage specific and we find that the respondent has on the grounds of the applicant's marital status treated her less favourably than he treats or would treat an unmarried woman of the same sex'."**

G

30. In **Graham** the EAT agreed that the Tribunal had been plainly right. The Chief Constable might have advanced other reasons both at the time of the rescission and later which were not marriage-specific, but his first and primary reason was that the claimant in that case

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would not be a competent and compellable witness against her spouse in any criminal proceedings and that was a marriage-specific reason.

31. In **Hawkins** the Appeal Tribunal endorsed that approach observing that it was clear that the major reason for the decision to rescind the appointment was based on the fact of marriage, in other words, it was a marriage-specific reason. In this case too the Claimant's contention is that the treatment was marriage-specific. He contends that the fact that he was married rather than merely having relationship difficulties was an essential part of his case. The issue to be tried if the case proceeded was whether the objection of his employer was not simply to relationship difficulties but to marriage difficulties, with the emphasis on marriage rather than difficulties in that composite phrase. There was accordingly a triable issue that should have been permitted to proceed.

32. I do not accept that my approach extends the meaning or interpretation of section 8 either to cover the status of divorce or so that it should be read as extending protection to something in connection with marriage by analogy with section 15 **EqA** in the context of disability, as Mr Cordrey contends. As far as divorce is concerned, if once divorced there is no longer the protected status of marriage that tells one nothing about whether section 8 protects someone who is presently married. The fact that the status of divorce is not protected does not inform the scope of the protection for the status of marriage. As far as the section 15 points are concerned, my conclusion simply means that provided being married or having the status of marriage is part of the reason for the treatment as a matter of fact, or at least arguably so, that is sufficient to invoke the protection of section 8 **EqA**. In a section 15 case the protected characteristic is not part of the reason at all. Nor is this tantamount to treating marital difficulties as a proxy for marriage. Although as a matter of generality one would not say that

A treating somebody less favourably because of marital difficulties is inherently discriminatory on grounds of marriage or is marriage-specific, it seems to me that context is everything. The context here is an employer who holds marriage in particular regard and for whom on the Claimant's pleaded case the fact that he was married and had *marital* difficulties played a significant part in the reason for his treatment.

B

C 33. Mr Cordrey contends that there are unintended consequences that flow from this conclusion and that lead to absurd results. He submits that this amounts to an extension of the law that is alarming. He submits that it would apply to a situation in which a church found that a vicar was a bigamist or had committed adultery and, therefore, dismissed him. Just as

D marriage difficulties can only be suffered by someone who is married, bigamy and adultery can only be committed by someone who is married. In each of those cases the dismissal is, in that sense, in consequence of or connected with marriage just as this Claimant's dismissal was in

E that loose sense, assuming the facts are established in consequence of or connected with marriage. He goes on to say that since direct discrimination cannot be justified, on the Claimant's reasoning any church that dismissed a bigamist or an adulterer would act unlawfully by committing an act of unlawful direct marriage discrimination under the **EqA**.

F

34. I do not accept this argument. Bigamy is a criminal offence. If a vicar is dismissed for the criminal offence of bigamy the true comparator is likely to be a vicar who commits a

G similarly serious criminal offence not involving marriage. In a bigamy case the fact of marriage is simply the context rather than the reason for the treatment. As far as adultery is concerned, that is similar to the 'marital difficulties' situation. The comparator would be a vicar who was

H sexually unfaithful to his common law partner. If that comparator would be treated differently than the married vicar because unmarried, then the dismissal or less favourable treatment that is

challenged would fall within the scope of section 8 and be prohibited just as is the case on the facts of this appeal. There is no scope for justification as a feature of direct discrimination law.

35. Mr Cordrey contends that the proper comparator here is not a single person who has relationship difficulties in a long-standing, common law spousal relationship but is a single person (therefore unmarried) dismissed for having a sexual relationship outside marriage, that being a sacrosanct holding of the church that there should be no sexual relationships outside marriage. I do not accept this argument either, which seeks to present a completely different case. The fact that this particular Respondent holds marriage sacrosanct and does so for good religious reason may form part of its motivation, but if the reason for less favourable treatment meted out to the Claimant is marriage, the analytical tool of the hypothetical comparator should identify suitably comparable facts leaving marriage out of the equation in order to test whether marriage does, as the Claimant argues, form part of the reason. To introduce wholly different facts does not answer the question in this particular case.

Conclusion

36. Thus for all those reasons the Employment Judge was wrong to conclude that this case did not engage the protected characteristic in section 8 of marriage. On a reasonable reading of the Claimant's pleaded case, the facts give rise to an arguable case that it was his married status and his marital difficulties as a married man that led to his dismissal. That composite reason was, on his case, the reason for the Respondent's treatment of him and that case should have been permitted to proceed. In those circumstances I am satisfied that the Employment Judge was in error of law in striking out this claim which does engage that protected characteristic. The appeal accordingly succeeds and the decision of the Employment Judge striking out the claim on this ground must accordingly be set aside.